

Exhibit  
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1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEW JERSEY  
3 CIVIL ACTION CASE NO. 2:08-CV-1567

4 DR. FADI CHAABAN; DR. SABINO R. TORRE, DR.  
5 CONSTANTINOS A. COSTEAS and DR. ANTHONY J.  
6 CASELLA, as Trustee of Diagnostic & Clinical:  
7 Cardiology, P.A. Profit Sharing Plan,

8 Plaintiffs,

9 vs.

10 DR. MARIO A. CRISCITO,

11 Defendant.

12 Friday, December 4, 2009

13 Deposition of MARIO CRISCITO, M.D., VOLUME I,  
14 before Nancy A. Miani, a Certified Court Reporter,  
15 License No. XI00814, at the offices of WITMAN,  
16 STADTMAUER, ESQS, 26 Columbia Turnpike, Florham Park,  
17 New Jersey, on Friday, December 4, 2009, at 12:45 p.m.

18  
19  
20  
21 MIANI COURT REPORTING  
22 CERTIFIED COURT REPORTERS  
23 1741 DANIEL COURT  
24 WALL, NJ 07719  
25 (732) 681-4776

# INDEX.

1 WITNESS DIRECT CROSS REDIRECT RECROSS  
2 MARIO CRISCITO, M.D.  
3 BY MR. CHARME 6

## EXHIBITS

EXHIBIT NO.	DESCRIPTION	PAGE
Criscito-1	Indenture Creating Diagnostic & Clinical Cardiology, PA Money-Purchase Pension Plan	11
Criscito-2	Amendments to the Trust Instrument	14
Criscito-3	Minutes of Meeting	17
Criscito-4	Diagnostic & Clinical Cardiology Money-Purchase Pension Plan Adoption Agreement	19
Criscito-5	Regional Prototype Non-Standardized Money-Purchase Safe Harbor Pension Plan Adoption Agreement Number 02-003	21
Criscito-6	Amendment to Diagnostic & Clinical Cardiology, P.A.	24
Criscito-7	Adoption Agreement for the American Pension Corporation Prototype Non-Standardized Money Purchase Plan 01-007	25
Criscito-8	Resolution of the Board of Directors of Diagnostic & Clinical Cardiology, P.A.	27
Criscito-9	Diagnostic & Clinical Cardiology, P.A., Profit Sharing Plan	28

## APPEARANCES:

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6 Attorneys for the Plaintiffs  
7  
8 KERN, CONROY & SCHOPPMANN, P.C.  
9 1120 Route 22 East  
10 Bridgewater, NJ 08807  
11 BY: STEVEN KERN, ESQ.  
12 Attorneys for the Defendant

## ALSO PRESENT:

3 Anthony Casella, M.D.

## EXHIBITS

EXHIBIT NO.	DESCRIPTION	PAGE
Criscito-10	Limitation of Legal Liability	29
Criscito-11	Resolution of the Board of Directors of Diagnostic & Clinical Cardiology, P.A.	34
Criscito-12	Amendment to the Diagnostic & Clinical Cardiology, P.A., Money Purchase Plan	35
Criscito-13	Form 5500 for 1999	36
Criscito-14	Form 5500 for 2000	37
Criscito-15	Form 5500 for 2001	38
Criscito-16	Form 5500 for 2002	38
Criscito-17	Form 5500 for 2003	42
Criscito-18	Form 5500 for 2004	43
Criscito-19	Form 5500 for 2005	44
Criscito-20	Mortgage Statements for Morgan Stanley for 1999	87
Criscito-21	Complaint	93
Criscito-22	Document dated January 14, 2002	116
Criscito-23A	Sovereign Bank Fax One of Two	117
Criscito-23B	Sovereign Bank Fax Two of Two	117

5

LITIGATION SUPPORT

DIRECTION NOT TO ANSWER

115-7

MOTION TO STRIKE

(None)

DOCUMENT REQUEST

123-16

EXHIBIT ANALYSIS

Original Exhibits retained by Mr. Charme

7

A. Yes.

Q. I have to ask you the next question. Are you taking any kind of medicine, or do you have any other kind of medical situation that would stop you from understanding what I'm going to be asking and giving truthful answers?

A. Well, I'm taking a lot of medication.

Q. Okay. Does any of that medication, as far as you know, interfere with your ability to give truthful answers?

A. No.

Q. Would you state your date of birth for the record?

A. 5/22/39.

Q. And are you married?

A. Yes.

Q. Your wife's name?

A. Donna.

Q. And how long have you been married?

A. Since 1989.

Q. Okay. Do you have any children?

A. Yes.

Q. How many?

A. Three.

Q. All from Donna?

6

MARIO CRISCITO, M.D.,

32 Chelsea Drive, Livingston, New Jersey, sworn.

DIRECT EXAMINATION BY MR. CHARME:

Q. Good afternoon, Dr. Criscito.

A. Good afternoon.

Q. We've met once before. My name is Stephen Charme. I represent the plaintiffs in the federal lawsuit. Could you first tell me if you've had your deposition ever taken before?

A. Not that I can recall.

Q. Okay. So let me just go over some of the ground rules.

I'm going to be asking you some questions, and the questions and your answers are going to be recorded by the Reporter. Do you understand that?

A. Yes.

Q. Okay. If I ask you something and you don't understand it, please tell me and I will do my best to clarify it for you. Do you understand that?

A. Yes.

Q. If you don't ask me to clarify something, then I will assume you understood the question and that you will give me a complete and honest answer. Do you understand that?

8

A. No. One from Donna, two from a previous marriage.

Q. What's the name of the one from Donna?

A. Maressa, M-A-R-E-S-S-A.

Q. Is she an adult? Is she over --

A. 20.

Q. She's 20. Okay. Can you tell me your educational background briefly, please.

A. From where?

Q. Start with med school.

A. University of Padova, Italy.

Q. What year did you graduate?

A. 1969.

Q. Okay.

A. And internship at St. Barnabas in Livingston. And three years of --

Q. Excuse me. How long was the internship at St. Barnabas?

A. I think it was 15 months.

Q. Okay.

A. Then three years of internal medicine at St. Barnabas.

Q. Was that another internship?

A. No, internal medicine residency.

Q. Residency. Okay.

9

1 A. And then two years of fellowship in  
2 cardiology at St. Barnabas.  
3 Q. After the fellowship in cardiology, did  
4 you open your own practice?  
5 A. I opened -- I was practicing prior to  
6 that.  
7 Q. You were. When were you practicing on  
8 your own?  
9 A. 19 -- what the hell is it? 1974.  
10 Q. Okay. What was the name of the practice?  
11 A. It was myself.  
12 Q. Just yourself. Okay. At some point, did  
13 you participate in a practice called Diagnostic &  
14 Clinical Cardiology?  
15 A. Yes.  
16 Q. When was that?  
17 A. 1975 or '76.  
18 Q. Okay. And is there a reason that you  
19 used that entity to practice instead of just  
20 practicing on your own?  
21 A. No, I was advised to form a corporation.  
22 Q. And that was Diagnostic & Clinical  
23 Cardiology, P. A.?  
24 A. Correct.  
25 Q. Okay. When you started it in 1975, were

10

1 there any other members of it besides you?  
2 A. No.  
3 Q. Subsequently, did anyone join -- for  
4 short, I'm going to just call it Diagnostic.  
5 A. Okay.  
6 Q. Subsequently, did anyone join Diagnostic?  
7 A. Yes.  
8 Q. Who was that?  
9 A. Dr. Casella.  
10 Q. When did he come?  
11 A. 1977.  
12 Q. Okay. And at some point, did he become a  
13 member of Diagnostic, or did he become a member right  
14 away?  
15 MR. KERN: What do you mean by "member"?  
16 Q. It's a professional association. Did he  
17 become a shareholder right away?  
18 A. I would -- you know, I don't know. I  
19 don't know.  
20 Q. Okay. When you hired him, did you view  
21 him as an equal partner?  
22 A. He became an equal partner.  
23 Q. When was that?  
24 A. I don't know. You'd have to ask him.  
25 Q. Was it within the first five years after

11

1 he was hired?  
2 A. I believe so.  
3 Q. Okay. When Diagnostic was formed, did  
4 you also arrange for a pension plan to be enacted?  
5 A. Yes.  
6 Q. What I'm going to do is show you a series  
7 of documents. I don't need you to read them, but I  
8 just need you to confirm for me whether or not it's  
9 your signature on the documents. Okay.  
10 (Exhibit Criscito-1 is marked for  
11 Identification.)  
12 Q. Let's start, I'm going to show you what's  
13 premarked as Criscito 1. It's entitled "Indenture  
14 Creating Diagnostic & Clinical Cardiology, P.A.,  
15 Money-Purchase Pension Plan," and further down on the  
16 page it says effective April 1, 1976.  
17 If you would please, Dr. Criscito, turn  
18 --  
19 A. Take these?  
20 Q. Yes, take that, please. Turn to the last  
21 page. There's Bate stamps. It's 2279. Okay. There  
22 is a signature on the right side that says "by." Is  
23 that your signature?  
24 A. It may be.  
25 Q. You're not sure?

12

1 A. If I don't see originals, I'm -- no, I  
2 will never do -- never say it's mine.  
3 Q. Well, do you recognize that to be your  
4 handwriting?  
5 A. May be.  
6 Q. You're not sure?  
7 A. It may be.  
8 Q. Do you know what your own handwriting  
9 looks like?  
10 A. Yes.  
11 Q. Do you know what your own signature looks  
12 like?  
13 A. Yes.  
14 Q. Does that look like somebody else's  
15 signature?  
16 MR. KERN: Objection. Argumentative.  
17 A. I don't know.  
18 MR. CHARME: It's not argumentative at  
19 all.  
20 MR. KERN: He already said he doesn't  
21 know.  
22 Q. Look at the line below that says  
23 "trustee." Do you know if that's your signature?  
24 A. May be.  
25 Q. So sitting here today, you're not sure if

13

1 that's your signature?

2 A. I can't vouch by it.

3 Q. In 1976, as far as you know, were you the  
trustee of the Diagnostic & Clinical Cardiology P.A.  
Money-Purchase Pension Plan?

6 A. Well, can you tell me what a trustee  
7 means?

8 Q. You don't know what a trustee means?

9 A. No.

10 Q. So let me ask the question differently.

11 There is a reference on the last page  
12 that's Bate stamped 2279, and it says "trustee" and  
13 then there's a signature. I know you've told me that  
14 you can't say for sure if that's your signature. Are  
15 you also telling me that sitting here today you don't  
16 know what a trustee is?

17 A. I don't know, correct.

18 Q. Okay. If that is your signature and you  
19 signed this document, do you think you knew what a  
20 trustee was when you signed the document?

21 A. I signed a lot of documents, Mr. Charme,  
22 to be honest, and I don't -- didn't read them. I just  
23 signed them.

24 Q. You just signed documents without reading  
25 them?

14

1 A. Correct.

2 Q. Is that your usual practice?

3 A. A lot of times, yes.

4 Q. Okay. Let me take that back.

5 Have you heard of a company called  
6 American Pension Corporation?

7 A. Yes.

8 Q. And who are they?

9 A. American Pension.

10 Q. Did you hire them to be the third party  
11 administrator for the Diagnostic pension plan?

12 A. I believe so.

13 Q. And when did you do that?

14 A. I haven't the slightest idea.

15 Q. Do you think you did it soon after the  
16 pension plan was formed?

17 A. I -- I honestly, I can't tell you. I  
18 don't know.

19 (Exhibit Criscito-2 is marked for  
20 Identification.)

21 Q. Okay. I'm going to show you what I'm  
22 marking as Criscito-2, which is entitled "Amendments  
23 to the Trust Instrument Creating the Diagnostic &  
24 Clinical Cardiology, P.A., Money Purchase Pension  
25 Plan." There is Bate stamp numbers on this, and I'd

15

1 like you to turn to the last page that's Bate stamped  
2 7875. Do you recognize that as your signature, where  
3 it says "by"?

4 A. May be. Looks different than the other  
5 one.

6 Q. Did you ever authorize anyone to sign  
7 your name on legal documents?

8 A. I don't recall.

9 Q. You don't recall doing that, do you?

10 A. I don't recall.

11 Q. Looking down where it says "trustee," do  
12 you know if that's your signature?

13 A. May be.

14 Q. You're not sure?

15 A. Correct.

16 Q. It could be, but you don't know?

17 A. Correct.

18 Q. What would be required in order for you  
19 to know?

20 A. Somebody to look at the original and go  
21 over it.

22 Q. Okay. So --

23 A. I don't know. You're always told not to  
24 express things. I have had people sign my documents,  
25 my name.

16

1 Q. Okay.

2 A. That have been involved in lawsuits that  
3 proved not to be me.

4 Q. You've had people without your prior  
5 knowledge or consent sign your name to documents?

6 A. Correct.

7 Q. What kind of documents were those?

8 A. Stock documents.

9 Q. Okay. Anything besides stock documents?

10 A. No, just documents on the whole. A lot  
11 of documents have come across my desk, crossed me,  
12 that I do not read, and I -- foolishly, I don't read,  
13 and I don't look at it in detail.

14 Q. Okay. What kind of stock documents are  
15 you talking about?

16 A. Stock documents involved putting me as a  
17 trustee for debt that other people have incurred.

18 Q. A trustee -- I'm sorry.

19 A. I don't know if that's the correct word.

20 Mr. Charme. Making me responsible for debt that other  
21 people have incurred.

22 Q. Okay. In a stock situation?

23 A. Correct.

24 Q. Did it ever come to your attention  
25 concerning the Diagnostic pension plan that anyone



57

1 Q. Okay. Do you think you signed it first  
2 and then sent it back?  
3 A. Yeah.  
4 Q. Okay. So is it your testimony that you  
5 did not arrange to file any of the Form 5500's?  
6 A. Not that I recall.  
7 Q. Okay. You don't recall mailing any Form  
8 5500's to the IRS?  
9 A. Not that I recall. Not that I recall.  
10 Q. Okay. I'm going to show you what was  
11 marked as Warnock-10. Can I have that back, please.  
12 A. (The witness complies.)  
13 Q. Which consists of two separate pages. If  
14 you look at the top of the first page, there is a fax  
15 number, it says 973-994-1906. That was your home fax  
16 number?  
17 A. Correct.  
18 Q. So is it fair for me to assume that this  
19 document came from your home fax machine?  
20 A. Yes.  
21 Q. Okay. And on the second page, it also  
22 has a fax number of 973-994-1906. Same number, right?  
23 A. To me they look the same pages.  
24 Q. Well, there's a little bit of a  
25 difference, which I'll talk to you about. Hang on a

58

1 minute.  
2 MR. CHARME: Off the record a minute.  
3 (There is a discussion off the record.)  
4 Q. First of all, do you remember seeing this  
5 document before today?  
6 MR. KERN: Before today?  
7 MR. CHARME: Yes, before today.  
8 A. Yeah, I saw it.  
9 Q. Do you remember seeing it before the  
10 lawsuit was started?  
11 A. Not that I recall.  
12 Q. Okay. So the first time you remember  
13 seeing this is after the lawsuit?  
14 A. Correct.  
15 Q. Okay. Do you know what this document is?  
16 A. No. I mean, no.  
17 Q. Okay. Brian Warnock testified that these  
18 were year end values that you furnished to him so that  
19 he could put together a Form 5500. Does that refresh  
20 your memory as to what this is?  
21 A. If that's what he said, then that may be  
22 what it is. I have no idea.  
23 Q. Okay. There is an entry here for Morgan  
24 Stanley Dean Witter, it says 4,017,942.57. Do you  
25 recall that's the year end value for 1999 that you

59

1 supplied to Brian Warnock?  
2 A. It may be the -- it may be the year end  
3 value of the pension. See, here it says December. I  
4 don't know if this was year end value, whether it was  
5 considered year end value as far as -- because we had  
6 year end values in March, end of March, and I don't  
7 remember.  
8 Q. See on the first page it says January 1,  
9 1999, to December 31st, 1999.  
10 A. I understand that, but that was the  
11 calendar year, and I don't know if the pension fund  
12 was, pension year was ended at the end of March, 1999.  
13 Q. Well, do you know, did you understand  
14 that American Pension Corporation, when they asked for  
15 year end values, was looking for year end calendar  
16 values?  
17 A. No.  
18 Q. You didn't understand that?  
19 A. No.  
20 Q. You thought they might be asking for a  
21 different kind of year end value?  
22 A. Yes.  
23 Q. What kind of other year end value is  
24 there if it's not tied to the calendar?  
25 A. You know, I thought -- this was a

60

1 confusing year for me. It may have been in March.  
2 Q. Why was 1999 a confusing year for you?  
3 A. Well, my parents were dying. I was  
4 diagnosed with radical cancer, prostate, so multiple  
5 things. It was a very confusing year for me.  
6 Q. Was the whole year very confusing?  
7 A. Very confusing. I had my father living  
8 with me, Alzheimer's, my mother-in-law was with us,  
9 dying. Subsequently after that, too, but that's not  
10 -- that's not --  
11 Q. Did you tell any of that to the American  
12 Pension Corporation, that it was a very confusing year  
13 for you?  
14 A. Personal things I don't like to discuss  
15 with anybody.  
16 Q. Okay. Well, without telling them the  
17 reasons, did you tell them it was a very confusing  
18 year?  
19 A. No. No, sir.  
20 Q. Okay. Are you aware whether in 1999  
21 there was a commingled account at Morgan Stanley Dean  
22 Witter?  
23 A. No, sir.  
24 Q. Okay. Going to Solomon Smith Barney, are  
25 you aware in 1999 whether there was a commingled

61

1 account for Solomon Smith Barney?

2 A. No, sir.

3 Q. Up above, there's handwriting, which says  
 4 "do Mario's report ASAP and send to Mario so he can  
 5 transfer to separate account." Do you recall in 1999  
 6 around that time telling Brian Warnock that you wanted  
 7 to segregate the accounts?

8 A. 1999?

9 Q. Yes. Around the end of 1999, early 2000,  
 10 do you remember telling Brian Warnock that you wanted  
 11 to segregate the accounts that were in the commingled  
 12 account?

13 A. No.

14 Q. Do you know what he is referring to?  
 15 Because Brian Warnock testified that that notation was  
 16 an instruction by you so that the accounts could be  
 17 segregated, those accounts in the commingled account,  
 18 in January of 2000. Do you remember having any  
 19 discussion with Brian Warnock about that?

20 A. Maybe prior -- maybe in January I found  
 21 out that there was commingled accounts, and I said you  
 22 got to be kidding me. I said, whoever is in my  
 23 account, get them the hell out of it, I don't want to  
 24 be responsible for it.

25 Q. So in January of 2000 is the first time

62

1 you found out there were other people in the  
 2 commingled account, which you thought was just you  
 3 before?

4 A. Correct.

5 Q. And so when you said to Brian, you said  
 6 to Brian, you know, I want those people out. Is that  
 7 correct?

8 A. Correct.

9 Q. And what did he say?

10 A. We'll get them out.

11 Q. Do you know someone named Antoinette  
 12 Foggio, F-O-G-G-I-O?

13 A. Yes.

14 Q. Brian Warnock testified that she remained  
 15 in the commingled account with you after the other  
 16 people were segregated out. Do you know why?

17 A. Because she was supposed to go out with  
 18 everybody else.

19 Q. So you think that was a mistake?

20 A. Probably so.

21 Q. But you don't know one way or the other  
 22 why she remained in?

23 A. I didn't even know she was in.

24 Q. There is a reference on the first page of  
 25 Exhibit 10, where it says Morgan Stanley, to the

63

1 number 4,017,942.57. Do you know if that number came  
 2 from a brokerage statement?

3 A. I don't remember, sir.

4 Q. And same question for Solomon Smith  
 5 Barney, where it says 798,425.50, do you know if that  
 6 came from a brokerage statement?

7 A. I don't know.

8 Q. North American Venture, same question, do  
 9 you know if the \$50,000 came from a brokerage  
 10 statement?

11 A. I don't know.

12 Q. So you don't know where those numbers  
 13 came from?

14 A. I may have called. I may have called.

15 Q. You might have called the financial  
 16 institutions?

17 A. Right.

18 Q. Do you recall specifically doing that?

19 A. I think they wanted some -- some  
 20 information, and that's, I think, the way I got it,  
 21 called them, asked them what the value of the accounts  
 22 were back in March, and they gave me these numbers.

23 Q. Why did you ask them what the value of  
 24 the accounts were back in March?

25 A. Because that's when I thought the year

64

1 ended.

2 Q. The year ended for what?

3 A. For the pension fund.

4 Q. And you didn't understand that APC was  
 5 looking for year end values based on the calendar?

6 A. No.

7 Q. Okay. In prior years, do you remember  
 8 sending year end values to APC based on the calendar  
 9 years?

10 A. I don't -- I don't remember at all.

11 Q. Brian Warnock testified that you did, but  
 12 you don't remember?

13 A. Not at all, sir.

14 Q. Okay. In 1999, you were receiving  
 15 brokerage statements from Morgan Stanley Dean Witter,  
 16 correct?

17 A. Yes.

18 Q. And you were also receiving brokerage  
 19 statements from Solomon Smith Barney, correct?

20 A. Correct.

21 Q. Let me have that back for a moment,  
 22 please.

23 A. (The witness complies.)

24 (There is a discussion off the record.)

25 Q. I'd like to show you Warnock-23, which is

73

1 Q. Which people were they?  
 2 A. Mark Brown, Dr. Chaaban, that I know of.  
 3 Q. When you say they wanted their money, was  
 it your understanding they wanted a distribution, or  
 they just wanted their own separate, segregated  
 6 account?  
 7 A. Separate, segregated account.  
 8 Q. Okay. Who was the first person you heard  
 9 of who wanted their own separate, segregated account?  
 10 A. I don't know.  
 11 Q. Okay. Do you recall Mark Brown ever  
 12 asking you for the value of his account and holding up  
 13 your hand and writing something in ink on your hand?  
 14 A. Absolutely not.  
 15 Q. Never happened?  
 16 A. Never happened.  
 17 Q. Do you recall him ever asking you for the  
 18 value of his account?  
 19 A. If he did, I told him to see Dr. Casella  
 20 because he was the man that was writing all the  
 21 checks.  
 22 Q. Well, as far as you knew, was Dr. Casella  
 23 receiving copies of the same brokerage statements that  
 24 you did, that designated you as the trustee?  
 25 A. I have no idea.

74

1 Q. Well, I thought you said that since you  
 2 believe that the money was all yours, you told Brian  
 3 that only you were supposed to get information. Isn't  
 4 that right?  
 5 A. About my own accounts.  
 6 Q. Okay. And so that we're clear, you  
 7 believe that the Morgan Stanley account, in which you  
 8 were listed as the trustee, that all the money  
 9 belonged to you?  
 10 A. Correct.  
 11 Q. And the same with Smith Barney, right?  
 12 A. Yes.  
 13 Q. So before you found out that there were  
 14 other people in there, your instructions to Brian  
 15 Warnock were that only you were supposed to get the  
 16 information because you thought this was all your  
 17 money, right?  
 18 A. Correct.  
 19 Q. And you alone made the investment  
 20 decisions for those accounts because you believed it  
 was your own money you were investing, right?  
 22 A. Correct.  
 23 Q. Before early 2000 or late 1999, do you  
 24 recall anyone who terminated their employment with  
 25 Diagnostic who said, you know, I have money in the

75

1 commingled account, I'd like it?  
 2 A. Talking to me?  
 3 Q. Yes.  
 4 A. I mean not you talking to me. The  
 5 employee talking to me?  
 6 Q. Yes.  
 7 A. No.  
 8 Q. Or American Pension Corporation talking  
 9 to you about that.  
 10 A. No.  
 11 Q. Do you recall ever -- withdrawn.  
 12 Brian Warnock testified that he never  
 13 received any brokerage statements from you to support  
 14 year end values. Is that correct?  
 15 A. Not that I can recall. I thought he was  
 16 getting them all from the brokerage firms.  
 17 Q. Did you tell any of the brokerage firms,  
 18 and I mean specifically Morgan Stanley and Smith  
 19 Barney, to send Brian Warnock brokerage statements?  
 20 A. May have.  
 21 Q. But do you recall doing it?  
 22 A. I may have.  
 23 Q. But you don't have a specific  
 24 recollection that you did?  
 25 A. Correct.

76

1 Q. Okay. Brian Warnock also said there was  
 2 no other form of backup that you sent to him for year  
 3 end values. Is that correct?  
 4 A. I don't know.  
 5 Q. You don't know?  
 6 A. No.  
 7 Q. Brian Warnock said that he expected to  
 8 rely on you for the accuracy of the information you  
 9 gave him as to year end values. Was that your  
 10 understanding?  
 11 A. I mean, he's -- Mr. Charme, he's talking  
 12 a lot. I probably spent 30 seconds with this guy a  
 13 year.  
 14 Q. Did you ever give Brian Warnock any  
 15 reason to think that he couldn't rely on you to give  
 16 him accurate information as to year end values?  
 17 A. No.  
 18 Q. Did you ever give Brian Warnock or anyone  
 19 else at APC any reason to think that you would be  
 20 dishonest in supplying year end values?  
 21 A. No.  
 22 Q. You said you only spoke to Brian Warnock,  
 23 what did you say, 30 seconds a year?  
 24 A. Something in that league. There was no  
 25 long discussion. There was no repetitive discussion,



77

1 either.

2 Q. Did you speak to anyone else more than a  
3 few minutes a year besides Brian Warnock at APC?

4 A. No. I may have spoken to Dominique. I  
5 think years ago there was another gentleman, I don't  
6 recall his name.

7 Q. When you found out that there were other  
8 people in the commingled account, did you understand  
9 that they were entitled to get their share of the  
10 value of the commingled account to put into their own  
11 segregated account?

12 MR. KERN: Could you repeat that.

13 MR. CHARME: I'll say it again.

14 Q. When you found out in late 1999 or early  
15 2000 that there were other people in the commingled  
16 account besides you, did you understand that to  
17 separate them out into their own segregated accounts,  
18 they were entitled to get a portion of what was in the  
19 commingled account?

20 A. Yes. If -- yes, when I found out -- yes,  
21 give them whatever their proportionate share would be,  
22 yes.

23 Q. So you understood at that point that all  
24 the money didn't belong to you, correct?

25 A. Correct.

78

1 Q. Okay. And you said -- and I think you  
2 just said they were entitled to get whatever their  
3 proportionate share was, correct?

4 A. Right.

5 Q. And that proportionate share would be  
6 based on the year end value of the accounts for 1999,  
7 since they were being segregated in 2000, right?

8 A. Yes. Whatever, yes.

9 Q. When you learned that other people -- you  
10 say you learned other people were in the commingled  
11 account and wanted to be segregated out. Did you make  
12 any particular efforts to make sure that the year end  
13 values for 1999 that APC would be relying on to  
14 segregate people out were correct?

15 A. Did I make any --

16 Q. Any special efforts to make sure, because  
17 now -- let me back up.

18 You said that when the people got  
19 segregated out, they would be entitled to a  
20 proportionate share of the value, year end value in  
21 the commingled account, right?

22 A. Correct.

23 Q. And that was the year end value as of  
24 1999 because they were getting segregated out in  
25 January of 2000, right?

79

1 A. Correct.

2 Q. And what I'm saying is to make sure that  
3 everyone got the right amount of money, did you make  
4 any special efforts as trustee to ensure that the 1999  
5 year end values were correct?

6 A. The year end values that I gave were the  
7 ones I -- I believe, I believe were the ones at the  
8 end of March I gave to them and I told them do  
9 whatever you have to do.

10 Q. Okay. But not my question. Aside from  
11 saying you gave them year end values, once you found  
12 out -- withdrawn.

13 When you first gave Brian Warnock the  
14 year end values, I think your testimony was you didn't  
15 know that there were other people in the commingled  
16 account, did you?

17 A. Correct.

18 Q. Okay. Once you found out that there  
19 were other people in the commingled account who would  
20 have to get segregated out, did you say to yourself,  
21 you know, I really better make sure, since this isn't  
22 all my money, to make sure that the year end values  
23 are correct?

24 A. To me, they were correct.

25 Q. Okay. So you didn't do anything in

80

1 addition to whatever efforts you had made previously  
2 to make sure they were correct.

3 A. That's correct. And I didn't know,  
4 either, I didn't know what percentages anybody was,  
5 either. I had no idea.

6 Q. I wasn't talking about their percentages,  
7 I was simply talking about the correct total 1999 year  
8 end value for Morgan Stanley and Smith Barney. You  
9 didn't make any special efforts to verify the  
10 information that you gave to Brian Warnock.

11 A. Not that I recall.

12 Q. Okay. Were you aware, once you found out  
13 that there were other participants in the commingled  
14 account, that they were entitled to have allocated to  
15 them the full value of whatever their proportionate  
16 share was?

17 A. Say that again.

18 Q. I'll rephrase the question.

19 When you found out that there were people  
20 in the commingled account who were entitled to a piece  
21 of it, if you will, were you aware that they were  
22 entitled to have that entire piece allocated to them  
23 all at once as opposed to in bits and pieces?

24 A. No.

25 Q. Did you think that you could still hold

81

1 back some of the money to which those people were  
2 entitled?

3 A. Could be.

Q. What was that based on?

A. I -- I'm not into this. I'm not into  
6 this. I understand what you're saying, but could be.  
7 I had no idea what was going on then. No idea. In  
8 fact, it blew my mind when that happened.

9 Q. So that I understand --

10 A. To me, only one person knew all about  
11 that, and that was Dr. Casella. He knew what they  
12 made, their names, their address, and what monies were  
13 given to them. I didn't know that. I had no idea.

14 Q. Do you recall that at one point, the  
15 pension plan year ended in March of 1999 -- I mean  
16 ended in March?

17 A. I had -- no.

18 Q. Okay. Because I think you said before  
19 that you used year end values as of March of 1999.

20 A. Correct.

21 Q. And I thought you said you did that  
22 because you thought that that's what the pension  
23 plan's year was.

24 A. Correct.

25 Q. What I'm saying to you, are you aware

82

1 that as of 2000, as well as 1999, the pension plan's  
2 year didn't end in 1999 -- didn't end in March?

3 A. Let me -- I learned a lot since this  
4 thing. All right. At that time, when I gave those  
5 numbers, I felt, I thought that the year ended in  
6 March of that year. Subsequently, I hear that that's  
7 not the case. All right. Now --

8 Q. When you say -- excuse me. When you say  
9 subsequently, you mean subsequent to the lawsuit?

10 A. Yeah, right. Now.

11 Q. Excluding your attorney, did you hear  
12 that from anybody else?

13 A. No, I didn't hear it from him.

14 Q. Who did you hear it from?

15 A. Myself.

16 Q. How did you find out?

17 A. I found out because somebody told me.  
18 Someone told me, because I needed the documents, that  
19 it changed at a certain point in time. It may have.  
20 I was not -- for years, it was March of 31. For  
years. Then it went back to the end of the year.

22 Then I thought it was back. I'm totally confused the  
23 when, whatnot, et cetera.

24 Q. Okay. Do you think it went back and  
25 forth from March to the end of the year more than

83

1 once, or that it used to be the pension plan ended in  
2 March of the year and then it was changed to the end  
3 of the calendar year?

4 A. I can't tell you, Mr. Charme. I -- I  
5 can't tell you.

6 Q. But when you sent in year end values in  
7 1999, you thought the year end values were supposed to  
8 be through March 31st?

9 A. Correct.

10 Q. Did you ever tell that to Brian Warnock?

11 A. No.

12 Q. On the sheet that was faxed to Brian  
13 Warnock that I showed you before, it says January --  
14 let me get the sheet out.

15 I'm looking at what was attached to Brian  
16 Warnock's letter that was Warnock-23. It says at the  
17 very top, "January 1, 1999 - December 31, 1999."

18 A. Correct.

19 Q. There's nothing on that sheet that  
20 indicates that year end values are through March 31,  
21 1999, is there?

22 A. No, but I thought that -- that was the  
23 calendar year you had to put down, but the pension  
24 fund was different. Pension funds were ending, I  
25 think, in March 31st. Calendar year was different

84

1 than the pension fund, you know.

2 Q. Okay. I understand what you're saying,  
3 but was it your understanding that -- withdrawn.

4 Did you ever, did you understand that  
5 looking at this, Brian Warnock would know that you  
6 were using March 31, 1999 year end values?

7 A. I thought he would.

8 Q. Why did you think that?

9 A. Because I thought that's when the pension  
10 fund year ended.

11 Q. Why didn't you put the date March 31,  
12 1999, anyplace on this fax that's attached to  
13 Warnock-23?

14 A. I have no idea.

15 Q. No idea?

16 A. No.

17 Q. Brian Warnock is not the person who  
18 prepared this fax, correct?

19 A. I don't believe so.

20 Q. You believe you did?

21 A. I -- I couldn't have prepared both of  
22 them.

23 Q. You couldn't have prepared both of them?

24 A. Right.

25 Q. Why not?

85

1 A. Because I'm not home at that time.  
2 Q. I didn't ask if you sent them, I asked if  
3 you prepared it. You could have prepared it a day or  
two earlier.

A. But there's changes, you said, on it.

6 Q. That's correct.

7 A. When those changes came back and then  
8 subsequently sent out, not me.

9 Q. Okay. In January of 2000, besides you  
10 and your wife, was there anyone else at home?

11 A. Not that I know of. Not that I can  
12 recall.

13 Q. So if you didn't send it back on that  
14 date with the change, you think your wife did?

15 A. Could have.

16 Q. Did you discuss with your wife the  
17 finances of the pension plan?

18 A. She doesn't -- I would say whatever the  
19 changes were to do.

20 Q. Okay. And so whatever the changes were,  
21 she would have to do on your instructions, right?

22 A. Correct.

23 Q. Assuming she did them.

24 A. Correct.

25 Q. Okay. So these, both of these documents

86

1 were prepared under your instructions, right?

2 A. Correct.

3 Q. Okay. When did you realize for the  
4 first time that the year end value that the people in  
5 the commingled account were supposed to get was  
6 supposed to be through December 31, 1999, and not  
7 March 31, 1999?

8 A. Recently.

9 Q. Not until after the lawsuit was started?

10 A. Uh-hum. Yes.

11 Q. So before the lawsuit was started, your  
12 understanding was that the year end values for the  
13 participants was whatever the statements, the  
14 brokerage statements showed as of March 31, 1999?

15 A. Yes.

16 Q. Okay. Let me just switch gears real  
17 quickly.

18 Did you ever make a claim on behalf of  
19 the plan with Selective Insurance Company?

20 MR. KERN: Ask that question again. I  
missed the question.

22 MR. CHARME: Could you repeat it please.

23 (The pending question is read back by the  
24 Reporter.)

25 A. Not that I know of.

87

1 Q. Did you ever make a claim on behalf of  
2 the plan with Travelers Insurance Company?

3 A. Not that I know of.

4 Q. Did you ever make a claim on behalf of  
5 the plan with any insurance company?

6 A. Not that I know of.

7 Q. Okay. I'm going to show you -- you need  
8 a minute?

9 A. No.

10 (Criscito-20 is marked for  
11 Identification.)

12 Q. I'm going to show you what's marked as  
13 Criscito-20, which are brokerage statements from  
14 Morgan Stanley for the year 1999.

15 MR. CHARME: You should have that. It  
16 should be in there, I guarantee it. I took it out of  
17 order.

18 MR. KERN: Since you guarantee, I'll let  
19 you find it.

20 (There is a discussion off the record.)

21 Q. Have you seen brokerage statements from  
22 Morgan Stanley before for 1999, Dr. Criscito?

23 A. Before now?

24 Q. Yes, before now.

25 A. You mean in 1999?

88

1 Q. Yes. In 1999, did you get brokerage  
2 statements from Morgan Stanley?

3 A. Yeah.

4 Q. You did, right?

5 A. Yeah, yeah.

6 Q. Okay. Can I have that for one moment,  
7 please. I want to show you something.

8 There is a name, Herb Mendel. Do you  
9 know Herb Mendel?

10 A. He was there. He was at Morgan Stanley.

11 Q. Okay. Is he the person at Morgan Stanley  
12 that you dealt with concerning the commingled account  
13 there?

14 A. He would have been one of them.

15 Q. Who else?

16 A. I don't remember. Marysue was there.

17 Q. Is that Marysue McCarthy?

18 A. Yes. There may have been some guy, or  
19 some lady, I forgot their names.

20 Q. Okay. I'm going to go back to  
21 Warnock-23, and the sheet that says "DCC P.A. Pension  
22 Fund January 1, 1999, to December 31, 1999." The  
23 number, the year end value for Morgan Stanley Dean  
24 Witter is 4,017,942.57. Do you see that?

25 A. Yes.

93

1 Q. How did you happen to sell some of the  
2 Veritas stock in January of 2000?

3 A. Something must have come into my head  
that said do it, and I do it.

(Exhibit Criscito-21 is marked for  
6 Identification.)

7 Q. I'm going to show you what I've marked as  
8 Criscito-21, which is the complaint in this lawsuit,  
9 and ask you if you've seen that document before today.

10 A. Yes.

11 Q. Okay. If you would, please, take a look  
12 at what's Exhibit 1 to the complaint, which is a  
13 Morgan Stanley statement for the period ending  
14 December 31, 1998.

15 A. Where is that?

16 Q. I'll get it for you.

17 Okay. In 1998, I see reference to 11  
18 Chadwick Road, Livingston, New Jersey. That's where  
19 you were living?

20 A. Correct.

21 Q. You were getting brokerage statements  
22 from Morgan Stanley in 1998, correct?

23 A. Correct.

24 Q. Okay. And there is a description on this  
25 statement of different investments, Lucent

94

1 Technologies, NYCAL, Sandis Corp., UniCapital  
2 Corporation, Veritas Software. Do you see those?

3 A. Yes.

4 Q. Whether in consultation with the broker  
5 or on your own, you're the one who made the ultimate  
6 decision to purchase those particular stocks, right?

7 A. Correct.

8 Q. Okay. Do you recall in 1998 when you  
9 gave Brian Warnock year end values if you used them as  
10 of March 31, 1998, as opposed to December 31?

11 A. I can't tell you, sir.

12 Q. Don't know. Okay. Veritas stock, would  
13 it be fair to say, was a volatile stock, a lot of  
14 movement?

15 A. There was movement in it.

16 Q. It was moving quite a bit in 1998, 1999,  
17 wasn't it?

18 A. Yes, I believe so.

19 Q. You picked it because you thought you  
20 could make money, right?

A. Absolutely.

22 Q. In fact, you picked each of these  
23 investments because you thought you could make money,  
24 right?

25 A. Correct.

95

1 Q. And am I correct, you never discussed the  
2 particular investments because in 1998, as far as you  
3 knew, you were the only one in the commingled account?

4 A. Yes.

5 Q. And the same thing was true for most of  
6 1999, except maybe toward the very end or the  
7 beginning of 2000?

8 A. Say that again. Say that again, because  
9 I didn't -- because my mind was someplace else. Go  
10 ahead.

11 Q. You didn't discuss your investments in  
12 1999 with anyone because as far as you were concerned,  
13 you were the only one in the commingled account,  
14 right?

15 A. Correct.

16 Q. Okay. Turn, if you would, please, to  
17 the next page, which is Exhibit 2 to the complaint.

18 A. 918?

19 Q. Let me see. If you look, this is a  
20 statement for the month ending December 31, 1999,  
21 right?

22 A. Yes.

23 Q. Okay. You got this from Morgan Stanley?

24 A. I don't know where it came from.

25 Q. Let me say the question differently.

96

1 As far as you know, during the years 1998  
2 and 1999, was there ever a month when Morgan Stanley  
3 skipped sending you a brokerage statement?

4 A. No. I don't believe so, no.

5 Q. It shows, it says total value of priced  
6 investments, 12,919,403.12. Do you see that?

7 A. Yes.

8 Q. Did you ever mention that number to Brian  
9 Warnock?

10 A. No, sir.

11 Q. Why not?

12 A. No reason to.

13 Q. Okay. And when you say no reason to,  
14 it's because of what you told me before, you thought  
15 when people were getting segregated from the  
16 commingled account, that the year end value was  
17 supposed to be March 31, 1999?

18 A. Correct.

19 Q. Okay. Besides Brian Warnock, did you  
20 tell anyone at Diagnostic that the year end value for  
21 the Morgan Stanley account was 12,919,403.12?

22 A. Not that I remember.

23 Q. So no one had any idea that this account  
24 had gone up significantly from the end of 1998 to the  
25 end of 1999?



97

1 A. Correct.  
 2 MR. KERN: No one?  
 3 MR. CHARME: At Diagnostic.  
 4 A. You know, that's a good -- that's a good  
 5 -- I don't know. But I don't know.  
 6 Q. Okay. Let me ask you this --  
 7 A. Yeah. I mean, it's a good question, but  
 8 there's -- there's other implications here.  
 9 Q. What are those implications?  
 10 A. I don't know if -- I don't know who was  
 11 getting these statements.  
 12 Q. Okay. But I think you testified earlier  
 13 that you never instructed Morgan Stanley to send them  
 14 to anyone besides you, did you?  
 15 A. I never instructed them, but I never told  
 16 them not to do it.  
 17 Q. Okay. Do you think Morgan Stanley would  
 18 send me your brokerage statements?  
 19 A. Could. Could. I mean, Mr. Charme, could  
 20 have.  
 21 MR. KERN: We know they did, so.  
 22 Q. The point that I'm making, Dr. Criscito,  
 23 is brokerage companies don't send their brokerage  
 24 statements to anyone other than the person on the  
 25 statement unless they have permission.

98

1 MR. KERN: That's your testimony.  
 2 MR. CHARME: Well, I'm asking.  
 3 MR. KERN: But we know there were  
 4 statements sent.  
 5 Q. I'm asking, is it your understanding that  
 6 Morgan Stanley was prepared to send your brokerage  
 7 statements to other people without your knowledge or  
 8 consent?  
 9 A. Could have.  
 10 Q. Okay. Do you know of any instances where  
 11 they did?  
 12 A. I think they did.  
 13 Q. Who did they send it to without your  
 14 knowledge or consent?  
 15 A. They may have sent it to the office, they  
 16 may have sent it to American Pension.  
 17 Q. Well, you keep saying may have, but do  
 18 you know specifically whether they ever did? Not may  
 19 have. Do you know specifically sitting here whether  
 20 they ever did that?  
 21 A. Now I do.  
 22 Q. Okay. What do you know?  
 23 A. That they did do it.  
 24 Q. To who?  
 25 A. To American Pension.

99

1 Q. When did they send brokerage statements  
 2 -- I'm talking about Morgan Stanley now -- to American  
 3 Pension without your knowledge or consent?  
 4 MR. KERN: Objection. They're two  
 5 different issues there.  
 6 MR. CHARME: Okay. I'll go back.  
 7 Q. When did they send, when did Morgan  
 8 Stanley, as far as you know, first send your account  
 9 brokerage statements to American Pension?  
 10 A. I don't know when exactly. I don't know  
 11 when.  
 12 Q. Was it in 2000?  
 13 A. It may have been 2000, may have been  
 14 before, and it may have been after.  
 15 Q. Okay. How did you find out?  
 16 A. Because Dr. Casella found them.  
 17 Q. Okay. So you're referring to the Morgan  
 18 Stanley statements that Dr. Casella found in 2007?  
 19 A. Yes.  
 20 Q. And is it your testimony that you never  
 21 authorized Morgan Stanley to send those brokerage  
 22 statements to American Pension Corporation?  
 23 A. It isn't I never authorized, I never -- I  
 24 never told them not to send them. I thought that was  
 25 an automatic.

100

1 Q. So you thought Morgan Stanley was  
 2 automatically sending your --  
 3 A. That's what I thought.  
 4 Q. Let me finish, please.  
 5 A. Sorry.  
 6 Q. You thought Morgan Stanley was  
 7 automatically sending your pension statements to --  
 8 your brokerage statements to American Pension  
 9 Corporation ever since the beginning of the commingled  
 10 account at Morgan Stanley?  
 11 A. Possibly, yes.  
 12 Q. You say possibly, but did anyone at  
 13 Morgan Stanley ever tell you they were doing that?  
 14 A. No.  
 15 Q. Okay. Did you ever ask anyone at Morgan  
 16 Stanley why they sent the brokerage statements that  
 17 Dr. Casella discovered at APC, why they sent those  
 18 statements to APC?  
 19 A. No.  
 20 Q. Never spoke to Herb Mendel about it?  
 21 A. No.  
 22 Q. Never spoke to Marysue McCarthy about it?  
 23 A. No, sir.  
 24 Q. Okay. Were you upset that those  
 25 brokerage statements had been sent by Morgan Stanley



105

1 point you thought was all your money, right?

2 A. Correct.

3 Q. Smith Barney was -- Smith Barney and  
Morgan Stanley were those two commingled accounts  
where you thought all the money was yours, right?

6 A. Correct.

7 Q. And so my question is we know that some  
8 portion of the money in the Morgan Stanley account was  
9 allocated to segregated accounts for participants.  
10 Are you aware of that?

11 A. Am I -- sorry.

12 Q. I'll say it again. Don't write on those.

13 Are you aware that some of the money from  
14 the Morgan Stanley commingled account in 2000 was  
15 allocated to segregated accounts for participants?

16 MR. KERN: Allocated by who?

17 MR. CHARME: It doesn't matter by whom,  
18 it was allocated out to segregated accounts.

19 A. Yes.

20 Q. Okay.

21 MR. KERN: You mean money was distributed  
22 out of that account?

23 MR. CHARME: I didn't say distributed.  
24 Distribution is something different.

25 MR. KERN: Transferred? I want to know

106

1 what you mean by the word "allocated."

2 MR. CHARME: It's a term of art. It  
3 means what it means.

4 MR. KERN: I don't know what it means.

5 Q. Do you know what it means?

6 A. No.

7 Q. Okay. Well, let me state the question  
8 differently.

9 In 2000, some of the money that you  
10 thought was all yours in the commingled account went  
11 to other participants, correct?

12 A. Yes.

13 Q. Okay. I'm not saying it went to them  
14 directly, it may have went to accounts for their  
15 benefit, correct?

16 A. Right.

17 Q. Okay. Did that happen at any time with  
18 regard to any of the money in the Smith Barney  
19 account?

20 A. I don't know.

21 Q. You don't know?

22 A. No.

23 Q. Okay. If you take a look at what I  
24 marked as Exhibit 5 to the complaint, if you look in  
25 the lower right hand corner, it has "quarterly total

107

1 value comparison." Do you see that? There's a bar  
2 chart.

3 A. I saw that before, yeah.

4 Q. And if you look under -- above 3/99, it  
5 says .735. Do you see that?

6 A. Where?

7 Q. Right here.

8 A. Oh, okay.

9 Q. Okay?

10 A. Yes.

11 Q. It says units in multiples of one  
12 million, so .735 means 735,000, right?

13 A. Right.

14 Q. I'm going to show you again the fax cover  
15 sheet that was sent to Brian Warnock that says "DCC  
16 P.A. Pension Fund, January 1, 1999 - December 31,  
17 1999," and next to Solomon Smith Barney the number is  
18 798,425.50. Do you see that?

19 A. Yes.

20 Q. You said before that you were using year  
21 end values as of March 31, 1999, right?

22 A. Correct.

23 Q. Do you know why the amount on what was  
24 faxed to Brian Warnock is higher than what's on the  
25 Solomon Smith Barney statement?

108

1 A. Someone may have gave it to me, that's  
2 what I put down. No.

3 Q. So with regard to what you put down for  
4 Solomon Smith Barney and what you faxed to Brian  
5 Warnock, you called someone at Smith Barney for that  
6 information?

7 A. Yes.

8 Q. Okay. You didn't rely on the brokerage  
9 statement?

10 A. No, sir.

11 Q. Okay. At some point, you found out that  
12 the 1999 year end values were supposed to be as of  
13 December 31st, 1999, not March 31st, correct?

14 A. Correct.

15 Q. Did you find that out before the lawsuit?

16 A. No. After.

17 Q. Okay. What steps, if any, have you taken  
18 to see that the participants in the commingled account  
19 get the proportional value based on the year end  
20 values for December 31st, 1999, instead of March 31st?  
21 MR. KERN: I object. That assumes he has  
22 any control over it, and as you well know, he no  
23 longer is trustee, hasn't been a trustee since the  
24 lawsuit was started.

25 MR. CHARME: Then he can say he's done

149

1 Q. So you were lending yourself the money?

2 A. Yes.

3 Q. Okay. Did you repay yourself back?

MR. KERN: Repay himself in terms of the pension fund?

6 Q. Let's take the \$150,000, because this is  
7 typical of the other things. With regard to this, so  
8 you're saying you lent yourself \$150,000 from the  
9 pension fund and you used the 150 to put it into Home  
10 Theater, right?

11 A. Correct.

12 Q. Did you pay yourself back somehow?

13 MR. KERN: You say yourself back. He paid  
14 monies back to the pension fund periodically. He's  
15 already testified to that.

16 MR. CHARME: I understand that, but he  
17 didn't --

18 Q. I'm asking with regard specifically, say,  
19 to this 150. Did you --

20 A. I can't --

21 Q. You can't say that, right?

22 MR. KERN: Say what? Can't say what?

23 MR. CHARME: That he specifically repaid  
24 the 150 to the pension fund.

25 MR. KERN: As opposed to a different 150?

150

1 MR. CHARME: Let me say it differently.

2 Q. You said that you took certain monies as  
3 distributions ultimately, which means to me that they  
4 didn't go back to the pension fund because otherwise  
5 it wouldn't be a distribution, right?

6 A. They went -- I don't know. I don't know.  
7 Listen to me, I don't know legally. All I know is if  
8 X number of dollars was taken as a loan, and then I  
9 finally took them as a distribution and paid taxes on  
10 it, that's what I did.

11 Q. How did you decide what amount to take as  
12 a distribution and what amount to put back into the  
13 pension fund?

14 A. (The witness nods in the negative.)

15 Q. No rhyme or reason?

16 A. No rhyme or reason.

17 Q. Let's take a look at exhibit --

18 MR. KERN: It's --

19 MR. CHARME: This is the last one.

20 Q. Exhibit 2, that's a deposit of 95,975  
into the pension fund.

22 A. Right.

23 Q. Do you know where that money came from?

24 A. From -- that's money that I had that I  
25 deposited into the pension fund.

151

1 Q. I understand. Do you know from where,  
2 from what account?

3 A. I -- no. From what account, no.

4 MR. CHARME: Let's stop here for today.

5 (At 4:15 p.m., the deposition is  
6 adjourned.)

152

# CERTIFICATION

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5 I, NANCY A. MIANI, a Certified Court Reporter  
6 and a Notary Public, License No. XI00814, do hereby  
7 certify that the foregoing witness, MARIO CRISCITO,  
8 M.D., was duly sworn by me on the date indicated, and  
9 that the foregoing is a true and accurate  
10 transcription of my stenographic notes.

11 I further certify that I am not employed by  
12 nor related to any party to this action.

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NANCY A. MIANI, C.S.R.  
LICENSE NO. XI00814